Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

RON EDWARDS, Warden,
Petitioner,

v.

MICHAEL HERRINGTON,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED

DID THE COURT OF APPEALS APPLY A TOO-STRICT STANDARD IN REVIEWING A TRIAL-TYPE ERROR IN HABEAS CORPUS?

LIST OF PARTIES

The petitioner in this action is Ron Edwards, Warden of the Ross Correctional Institution in Chillicothe, Ohio.

The respondent in this action is Michael Herrington, who is currently in custody at the Ross Correctional Institution.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS AND JUDGMENTS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 14

APPENDIX A-1

TABLE OF AUTHORITIES

Cases

Arizona v. Fulminate,
499 U.S. 279 (1991) 10
Boyde v. California,
494 U.S. 370 (1990) 9
Brecht v. Abrahamson,
507 U.S. 619 (1993) 9, 12, 13, 14
California v. Roy,
519 U.S. 2 (1996) 13
Cupp v. Naughten,
414 U.S 141 (1973) 8
Donnelly v. DeChristoforo,
416 U.S. 637 (1974) 9
Dowling v. United States,
493 U.S. 342 (1990) 9
Duncan v. Louisiana,
391 U.S. 145 (1968) 10
Estelle v. McGuire,
502 U.S. 62 (1991) 8, 9
Henderson v. Kibbe,
431 U.S. 145 (1977) 8
O'Neal v. McAninch,
513 U.S. 432 (1995) 10
Roy v. Gomez,
81 F.3d 863 (9th Cir. 1996) 13, 14
Sullivan v. Louisiana,
508 U.S. 275 (1993) 10, 11
United States v. Gaudin,
515 U.S. 506 (1995) 10
In re Winship,
397 U.S. 358 (1970) 10

Statutes

Ohio Revised Code § 2903.01(B) 2
Ohio Revised Code § 2911 3

No. _____

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RON EDWARDS, Warden,
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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner Ron Edwards respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-titled proceeding on January 26, 1999.

OPINIONS AND JUDGMENTS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, entered on January 26, 1999 under the caption *Herrington v. Edwards*, is unpublished. The decision is reproduced in a separate appendix filed herewith. Pet. App. at A-1. The United States District Court for the Southern District of Ohio issued an unpublished order and opinion on April 15, 1997, and that decision is likewise reproduced in the appendix. Pet. App. at A-17. The District Court also entered an unpublished order issuing a certificate of probable cause on December 11, 1997, and that decision is reproduced in the petition appendix at A-21.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 26, 1999. This petition for a writ of certiorari has been filed within 90 days of that decision, as provided in Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part: "Nor shall any State deprive any person of life, liberty, or property without due process of law."

In 1981, Ohio Revised Code Section 2903.01(B) defined aggravated murder as follows: "No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape,

aggravated arson or arson, aggravated robbery, aggravated burglary or burglary, or escape."

In 1981, Ohio Revised Code Section 2911.01 defined aggravated robbery as follows: "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either: (1) Without the consent of the owner or person authorized to give consent; (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent; (3) By deception; (4) By threat."

STATEMENT OF THE CASE

On December 18, 1981, a jury found Michael Herrington guilty of Aggravated Murder in violation of Ohio Revised Code § 2903.01(B) and Aggravated Robbery in violation of Ohio Revised Code § 2911.01(A)(1). The trial court merged the two convictions for sentencing, and sentenced Herrington to a term of life imprisonment on the murder charge. Herrington's convictions and sentence were affirmed on direct appeal. Herrington then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio, as permitted by 28 U.S.C. Section 2254. Herrington alleged, among other things, that an erroneous instruction by the trial judge deprived him of a fundamentally fair trial. The District Court denied relief. On January 26, 1999, the United States Court of Appeals for the Sixth Circuit reversed the decision of the District Court and ordered a grant of the writ, conditioned on Herrington's re-trial. The Sixth Circuit held that one of the trial judge's instructions deprived Herrington of a fair trial in violation of his constitutional right to due process.

The circumstances giving rise to Herrington's trial, conviction and sentence were described as follows by the Ohio Court of Appeals:

> On February 27, 1981, at about 7:30 P.M., Michael Herrington and Michael Howell, along with several other persons, were drinking and playing ping-pong at a residence on Bond Street in Dayton, Ohio when they decided to commit a robbery. Upon leaving the house, they encountered one Jim Terry. They told Terry that they were going to a bar and asked him to use his gun in case of trouble. Then, after receiving a loaded weapon from Terry, Herrington and Howell proceeded to the Fireside Lounge on Salem Avenue.
>
> Upon arrival at the parking lot of the Fireside Lounge, Herrington left the vehicle with the gun and robbed someone nearby while Howell remained in the car. The two individuals then proceeded to another bar and drank a few beers before proceeding to the Aztec Bar on North Main Street where they parked on the parking area of a bowling alley which was located next door to the Aztec Bar.
>
> At about the same time, Raymond Walton and Geraldine Rogers pulled off of the interstate highway to enable Rogers to locate a restroom, and upon stopping at the Aztec Bar, Walton waited outside while Rogers was inside the bar.
>
> At this point, Howell noticed

Herrington with the gun as he was talking to Walton, and the defendant told Howell to get into the car whereupon Walton drove for some distance before he and Herrington began to fight. While Herrington was beating Walton with the gun, he instructed Howell to get his money, and amidst the confusion, Walton lost control of his car causing it to crash into a tree at the intersection of Rabbit and McDaniel Streets. The noise from the crash drew the attention of several neighbors who witnessed the three males as they struggled inside the car. During the struggle, according to the evidence, the defendant fired one shot, after which Howell grabbed the gun. Both then left the automobile and ran. Later, Herrington and Howell divided the fifty dollars which had been taken from Walton.

Subsequently, Officer Gary Dunsky received a dispatch about the incident, and upon locating Walton, he removed him to Grandview Hospital where Walton died from a gunshot wound which lacerated his heart.

Thereafter, in June, 1981, Herrington was located in Miami, Florida after being arrested in connection with a traffic charge. He admitted that he had been in Dayton on February 27, 1981, but he denied that he was involved in any criminal activity with Howell on that date. He further denied any knowledge of the robbery and shooting on February 27, 1981. In fact, Herrington claimed at the trial that he didn't remember where he was on the evening of the crime alleged against him.

Pet. App. at A-58-59.

Herrington was indicted on charges of aggravated murder and aggravated robbery. Consistent with the indictment, and in addition to other instructions required by law, the trial court charged the jury with the definitions of each element of Aggravated Murder and Aggravated Robbery. An hour after it retii d to deliberate, the jury submitted a question to the trial court: "Can we members of the jury vote guilty on one count and not guilty on the other count?" The court responded, "I think in many cases where there is more than one count this is impossible. In this case where the facts are so entertwined it would be impossible for you to find him guilty on one count and not guilty on the other." Herrington's counsel objected to the trial judge's supplemental instruction, arguing that the jury should not be precluded from finding Herrington guilty of aggravated robbery only, even if to do so could be considered inconsistent with an acquittal on the aggravated murder count.

In his state appeals, and in his federal habeas corpus petition, Herrington argued that the judge's supplemental instruction to the jury was erroneous, and fundamentally prejudicial, because it could have been misconstrued by the jury as permitting his conviction of aggravated murder based on proof less compelling than the beyond-a-reasonable-doubt standard requires. The State argued in turn that even if the supplemental instruction had been erroneous, Herrington could not have been fundamentally prejudiced because the instructions were otherwise correct and the proof of Herrington's guilt was substantial.

The District Court found error, but agreed with the State that the error was harmless. Based on a thorough and

careful review of the facts, the District Court concluded that the erroneous supplemental instruction could not have had a substantial and injurious effect on the jury's ultimate verdict. The District Court determined that if the jury was inclined to convict Herrington of only one offense, the offense was aggravated murder. The District Court considered that the jury heard the testimony of Howell, Herrington's accomplice, who was an eyewitness to most of the events in question, and to whom Herrington had made incriminating admissions. The District Court also noted the testimony of other witnesses, to whom Herrington also talked about the crime. Finally, the District Court further noted that in his own defense, Herrington denied even being present at the scene.

Based on all of the above, the District Court concluded:

> Clearly, the jury's verdict turned on the credibility of the witnesses. Since, the jury, upon its initial deliberations, apparently was ready to convict the Petitioner of at least one of the crimes, it obviously placed Petitioner at the scene. The jury could not have believed the Petitioner when he said he was not involved, if it was willing to convict on at least one of the crimes. Conversely, the jury must have believed the accomplice and the other corroborating witnesses on the issue of Petitioner's presence and involvement in the crime.

Pet. App. at A-46.

On appeal, the Sixth Circuit agreed with the District Court that the supplemental instruction was erroneous, reasoning that if the jury found that the government had

proven all of the elements of the aggravated robbery charge, the judge's instruction improperly required the jury to convict on the aggravated murder charge as well. Thus the Court of Appeals determined that the instruction could have been applied by the jury in such a manner as to invade the province of the jury in violation of Sixth Amendment and the Due Process Clause.

However, the Court of Appeals rejected the District Court's finding that the error was harmless. While stating that the erroneous instruction did not involve a "structural defect," the Sixth Circuit determined that the supplemental instruction was fundamentally prejudicial, because it modified the prior instructions under which, absent the supplemental instruction, the jury might have convicted Herrington only on the robbery charge.

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT'S OPINION RAISES AN IMPORTANT FEDERAL QUESTION WHICH THE COURT SHOULD REVIEW.

A.

The Sixth Circuit treated the erroneous instruction as the functional equivalent of a structural error which necessitated a presumption of prejudice.

The Sixth Circuit found a violation of constitutional due process in this case solely on the ground that the trial court's supplemental instruction in essence directed the jury to

find Herrington guilty of aggravated murder, if it also believed him guilty on the lesser charge.

In *Estelle v. McGuire*, 502 U.S. 62 (1991), the Court thoroughly reviewed the appropriate standard to be applied where a habeas corpus petitioner contends that an erroneous jury instruction resulted in a deprivation of constitutional rights. The Court observed:

> The only question for us is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S 141, 147, 38 L.Ed. 2d 638, 94 S.Ct. 396 (1973); *see also Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L.Ed. 2d 203, 97 S.Ct. 1730 (1977); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 40 L.Ed. 2d 431, 94 S.Ct. 1868 (1974) ("It must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some [constitutional] right'"). It is well established that the instruction "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record. *Cupp v. Naughten*, *supra*, at 147. In addition, in reviewing an ambiguous instruction such as the one at issue here, we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution. *Boyde v. California*, 494 U.S. 370, 380, 108 L.Ed. 2d 316, 110 S.Ct. 1190 (1990). And we also bear in mind our previous admonition that

> we "have defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling v. United States*, 493 U.S. 342, 352, 107 L.Ed. 2d 708, 110 S.Ct. 668 (1990). "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." Ibid.

Estelle v. McGuire, 502 U.S. at 72-73.

In *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), the Court determined that upon federal habeas corpus review, a constitutional error that implicates trial procedures must be considered harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." If a federal habeas judge has grave doubt as to whether an unconstitutional trial error had substantial and injurious effect or influence in determining the jury's verdict, then the Court has held that the judge must grant the writ. *O'Neal v. McAninch*, 513 U.S. 432 (1995).

However, the Court has recognized a category of "structural" errors which defy harmless error analysis. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). In *Arizona v. Fulminate*, 499 U.S. 279, 309 (1991), the Court listed the following examples of "structural" error not subject to harmless error analysis: (1) total deprivation of the right to counsel; (2) biased judge; (3) unlawful exclusion of members of the defendant's race from a grand jury; (4) deprivation of the right to self-representation at trial; and (5) deprivation of the right to a public trial.

The Sixth Circuit determined that the supplemental instruction was constitutionally deficient insofar as it tended to direct the verdict of guilty on the aggravated murder charge. ("The court must not dictate the outcome. If it does

so, it has invaded the province of the jury protected by the Sixth Amendment and the Due Process Clause.") Pet. App. at A-8, citing *Duncan v. Louisiana*, 391 U.S. 145 (1968); *In re Winship*, 397 U.S. 358 (1970); *Sullivan v. Louisiana*, 508 U.S. at 277; *United States v. Gaudin*, 515 U.S. 506 (1995). The Sixth Circuit then ostensibly applied a harmless error analysis to the erroneous instruction, as opposed to finding structural error:

> In *Sullivan*, the Supreme Court explained that some errors are structural defects and defy harmless error review because such errors are per se harmful. *Sullivan*, 508 U.S. at 281 (holding that an instruction to the jury telling it to presume certain facts was structural error). The court stated that, "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the state would be sustainable on appeal; it requires an actual jury finding of guilty." Id. at 280. At the same time, this court does not agree that *Sullivan* makes all Sixth Amendment violations structural defects and instead requires that the error in the instruction rise to the same level as removing a factual determination from the jury. *See id.* at 280-81 (explaining the extraordinary gravity of the error at issue in that case). Because the facts in this case do not rise to the level of a structural error they are not per se unconstitutional. Therefore this court must determine whether the error was harmless before determining the disposition of the writ.

Pet. App. at A-14-15.

However, the Sixth Circuit then proceeded to treat the error as the functional equivalent of a structural error which required it to presume prejudice:

> We find that this error was not harmless. We can never know what was in the minds of the jurors; but the answer to their question was error, it modified the prior instructions, and absent the instruction it might have convicted only on the robbery charge. As such it could have had a substantial and injurious effect on the jury's independence and a substantial and injurious effect on the jury's interpretation of the initial, correct instructions. Thus, this court has grave doubt whether the instruction had substantial and injurious effect or influence in determining the jury's verdict, *O'Neal*, 513 U.S. at 436, even when viewing the judge's statements within the totality of the instructions. Thus we are required to treat the error as if it was prejudicial and grant the writ of habeas corpus. *Id.*

Pet. App. at A-15.

The Sixth Circuit's treatment of the District Court's harmless error analysis indicates that the Sixth Circuit actually applied a presumption of prejudice, in lieu of a correct application of *Brecht*. The following assumptions must be made in order to warrant a conclusion that the supplemental instruction had a substantial and injurious effect on the jury's verdict. First, it must be assumed that the jury intended to find Herrington not guilty of aggravated

murder; and, second, that the jury felt compelled to find him guilty of aggravated murder in any event, due to the supplemental instruction. The District Court determined that neither of these assumptions was very likely, given the evidence of Herrington's guilt, and his claim in defense that he was not involved in the crimes in any way.

Unlike the District Court, the Sixth Circuit did not focus on the likely impact of the supplemental instruction in the context of the entire record. Indeed, the Sixth Circuit disparaged the District Court's emphasis on the evidence. However, the Sixth Circuit did not identify any facts which indicated a substantial possibility that the jury actually intended to find Herrington not guilty of aggravated murder. Rather, the Sixth Circuit simply found that it was unable to rule out the possibility that the supplemental instruction was interpreted by the jury as a direction to find Herrington guilty on the aggravated murder charge. Accordingly, the Sixth Circuit determined that a presumption of prejudice was required.

The Sixth Circuit was correct in holding ostensibly that the erroneous instruction did not involve structural error. The jury was correctly instructed with respect to the elements of aggravated murder, and its duty to find each element beyond a reasonable doubt. Therefore, as recognized by the District Court, the potential impact of the erroneous supplemental instruction depended entirely on the likelihood that the jury would otherwise have determined that the evidence was insufficient to meet the State's burden of proof on the aggravated murder charge. Unfortunately, the Sixth Circuit rejected the District Court's proper application of *Brecht*.

B.

The Court should address the question whether the Sixth Circuit applied a too-strict harmless error standard in this case.

In *California v. Roy*, 519 U.S. 2 (1996), the Court found that an erroneous instruction that failed to require a jury verdict on an element of the offense was susceptible to harmless error analysis under *Brecht*. Like the Sixth Circuit in this case, the Ninth Circuit in *California v. Roy* ostensibly applied a harmless error analysis to the instruction, but actually applied a presumption of prejudice in granting the writ. *Roy v. Gomez*, 81 F.3d 863, 867-868 (9th Cir. 1996). The Court vacated and remanded, agreeing with the State that the Ninth Circuit had applied a too-strict harmless error analysis.

The Sixth Circuit's mistaken application of *Brecht* in this case is of equal import to the Ninth Circuit's mistaken harmless error analysis in *Roy*. A comparison of the two cases reveals a striking parallel. The Ninth Circuit held that it was required to reverse under *Brecht/O'Neal* because it was *unable* to gauge the effect of the erroneous instruction on the jury's verdict, thereby causing "grave doubt" as to the harmlessness of the error. *Roy v. Gomez*, 81 F.3d at 868. In the same manner, the Sixth Circuit found reversal required under *Brecht/O'Neal* because it was *unable* to determine "what was in the minds of the jurors," thereby causing "grave doubt" as to the erroneous instruction's substantial and injurious effect. Pet. App. at A-15. In both situations, the courts of appeal treated the error as akin to a "structural" defect not susceptible to harmless error analysis. Accordingly, petitioner respectfully submits that the Court should review the Sixth Circuit's decision.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests the Court to grant the writ.

Respectfully submitted,

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